The Owners of the Cargo Lately Laden on board the Ship or Vessel MV 'Viva Ocean' v The Owners or Demise Charterers of the Ship or Vessel MV 'Viva Ocean'

HIGH COURT (TAWAU) — ADMIRALTY IN REM NO AA T (27)-01 OF 1995
RICHARD MALANJUM J
8 APRIL 2000

Civil Procedure *— Pleadings — Amendment of — Application to amend defence — Trial completed and adjourned for decision — Whether amendment could be made at this stage — Whether amendment amounts to pleading a new defence*

This action was filed in 1995 and the trial proper commenced in May 1999. The defendant's case was that their liability was limited by the tonnage of the vessel under s 360 of the 1952 Ordinance as the loss or damage had occurred without the actual fault or privity of the defendant. Hearing was adjourned to August 1999 for written submissions and to raise any points raised. Submissions were finally filed in September 1999 and while the court proceeded to consider the case, the defendant on 18 January 2000 applied to amend the statement of denfence on the basis that s 360 of the 1952 Ordinance did not apply. The defendant conceded that the applicable legislation was the 1960 Sarawak Regulations which by the 1961 Sabah Regulations applied mutatis mutandis as of 1 April 1961. The defendant also submitted that s 360 and r 11 of the 1960 Regulations were in pari materia. The plaintiff objected to the amendments on the grounds that the parties had been given a month to submit as to whether the 1952 Ordinance applied. The defendant submitted that it did and supported itself accordingly. The defendant made no attempts to amend their statement of defence despite the plaintiff's arguments that the 1952 Ordinance did not apply. As the plaintiff did not have the opportunity to submit on whether the 1960 Regulations applied in view of the many amendments to admiralty law in Malaysia, indirectly the defendant was barring the plaintiff from submitting on the amended legislation. The plaintiff thus argued that to allow the defendant to amend its statement of defence now would be to give it an additional defence. Further, based on the defendant's defences pleaded, the plaintiff had elected not to cross examine on tonnage, which the plaintiff would have done had the defendant proceeded to make the amendments sooner,

Held, dismissing the defendant's application to amend:

(1) The defendant had failed to show that the application was made bona fide and that it would be just to allow the amendment in light of their earlier submissions on the applicability of the 1952 Ordinance. Counsel for the defendant had not been candid when he said that he had only recently been informed of the

1960 Sarawak Regulations and the 1961 Sabah Regulations (see pp 186H–187A).

(2) The position taken by the plaintiff should also be taken into account in considering whether there could be prejudice to them if the proposed amendments were allowed. In view of the defendant's earlier stand that the 1952 Ordinance was applicable, the plaintiff had deemed it unnecessary to go into the issue of tonnage of the vessel in question. The plaintiff would be prejudiced by being deprived of the opportunity to lead evidence of tonnage if the amendments in question were allowed. As the pleaded legislation was not applicable to begin with, the plaintiff had no reason to indulge on the issue of tonnage. If however the amendments were allowed, the evidence of tonnage would be vital (see p 187A–D).

(3) Thus if the application was allowed the case would have to be reopened to receive evidence of tonnage. This delay could have been avoided if counsel for the defendant had acted prudently. There would be uncertainty since witnesses would have to be located. Thus such amendments would be highly prejudicial for which money would not be adequate compensation (see p 187E–G).

(4) To allow the amendments would be to allow the defendant to plead a new defence as for a defence based on a the 1952 Ordinance all that the plaintiff had to do was to say it did not apply and was thus irrelevant to the case. With the amendments the plaintiff would have to address the issue as it is not disputed the cited legislation was applicable (see p 187G–H).

(5) It was a little too late to allow the amendments since the parties have concluded their case and it was pending judgment (see p 187H–I).

[Bahasa Malaysia summary

Tindakan difailkan pada tahun 1995 dan perbicaraan bermula pada bulan Mei 1999. Kes defendan menyatakan bahawa liabiliti mereka terbatas oleh banyaknya kargo yang boleh dibawa oleh kapal tersebut di bawah s 360 Ordinan 1952 sebab kerugian atau kerosakan telah berlaku tanpa kesalahan atau priviti defendan. Perbicaraan ditangguhkan sehingga Ogos 1999 untuk penghujahan bertulis dan untuk membangkitkan apa-apa hujah. Penghujahan akhirnya difailkan pada bulan September 1999 dan sementara mahkamah terus mempertimbangkan kes, defendan pada 18 Januari 2000 membuat permohonan untuk meminda pernyataan pembelaan atas alasan bahawa s 360 Ordinan 1952 tidak terpakai. Defendan bersetuju bahawa perundangan yang terpakai adalah Peraturan-Peraturan 1960 Sarawak yang mana adalah terpakai mutatis mutandis mulai 1 April 1961 melalui Peraturan-Peraturan Sabah 1961. Defendan juga

A berhujah bahawa s 360 dan r 11 Peraturan-Peraturan 1960 adalah pari materia. Plaintif membantah terhadap pindaan-pindaan itu berdasarkan alasan bahawa pihak-pihak telah diberikan tempoh sebulan untuk berhujah tentang sama ada Ordinan 1952 adalah terpakai. Defendan berhujah bahawa ia memang terpakai dan menyokong hemat ini dengan sewajarnya. Defendan tidak membuat
B percubaan untuk meminda pernyataan pembelaan mereka tidak kira hujah-hujah plaintif bahawa Ordinan 1952 tidak terpakai. Oleh kerana plaintif tidak berpeluang berhujah mengenai sama ada Peraturan-Peraturan 1960 terpakai memandangkan pelbagai pindaan kepada undang-undang angkatan tentera laut di Malaysia, secara
C tidak langsung defendan menghalang plaintif daripada menghujahkan perundangan terpinda. Justeru itu plaintif berhujah bahawa untuk membenarkan pernyataan pembelaannya di tahap ini akan memberikannya pembelaan tambahan. Seterusnya, berdasarkan pembelaan defendan yang diplidkan, plaintif telah memilih untuk tidak memeriksa-balas berkenaan jumlah kargo, yang mana plaintif
D tentu akan lakukan sekiranya defendan terus membuat pindaan lebih awal lagi.

Diputuskan, menolak permohonan defendan untuk meminda:

E (1) Defendan telah gagal menunjukkan bahawa permohonan telah dibuat secara bona fide dan adalah adil untuk membenarkan pindaan memandangkan penghujahan mereka yang lebih awal mengenai kesesuaian Ordinan 1952. Peguam pihak defendan tidak bersikap terus terang apabila beliau mengatakan bahawa ia sendiri hanya diberitahu tentang Peraturan-Peraturan Sarawak
F 1960 dan Peraturan-Peraturan 1961 Sabah baru-baru ini (lihat ms 186H–187A).

(2) Kedudukan yang diambil oleh plaintif juga haruslah diambil kira dalam menimbang sama ada kemudaratan kepada mereka mungkin berlaku sekiranya pindaan yang dicadangkan dibenarkan. Memandangkan pendirian defendan yang lebih awal
G bahawa Ordinan 1952 adalah terpakai, plaintif telah mengandaikannya tidak perlu untuk mendekati isu tentang banyaknya kargo yang boleh dibawa oleh kapal berkenaan. Plaintif akan dimudaratkan dengan lucutnya peluang untuk mengemukakan keterangan ke atas kargo yang boleh dibawa sekiranya pindaan berkenaan dibenarkan. Oleh kerana
H perundangan yang diplidkan tidak terpakai pertama sekali, plaintif tidak mempunyai alasan untuk meneruskan isu kargo yang boleh dibawa tanpa menghalangnya. Walau bagaimanapun, sekiranya pindaan dibenarkan, keterangan ke atas kargo yang boleh dibawa adalah penting (lihat ms 187A–D).

I (3) Justeru itu sekiranya permohonan tersebut dibenarkan, kes haruslah dibuka semula untuk menerima keterangan ke atas kargo yang boleh dibawa. Kelewatan ini seharusnya boleh dielakkan

seandainya peguam bagi pihak defendan telah bertindak dengan sikap berhati-hati. Ketidakpastian akan menimbul oleh kerana saksi-saksi hendaklah dicari. Justeru itu pindaan sedemikian adalah amat memprejudiskan yang mana wang tidak akan merupakan pampasan yang mencukupi (lihat ms 187E–G).

(4) Untuk membenarkan pindaan seolah-olah membenarkan defendan untuk memplid pembelaan baru disebabkan untuk satu pembelaan berasaskan Ordinan 1952, apa yang perlu dilakukan oleh plaintif adalah untuk mengatakan ia tidak terpakai dan dengan itu tidak relevan kepada kes. Dengan pindaan tersebut, plaintif akan terpaksa memberi perhatian kepada isu tersebut oleh kerana ia tidak dipertikaikan perundangan yang disebut adalah terpakai (lihat ms 187G–H).

(5) Adalah amat lewat untuk membenarkan pindaan tersebut kerana pihak-pihak telah menutup kes mereka dan ianya menunggu penghakiman (lihat ms 187H–I).]

Notes

For cases on amendment of pleadings, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3425–3444.

Cases referred to

Bacom Enterprises Sdn Bhd v Jong Chuk & Ors [1998] 2 MLJ 301 (refd)

Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 205 (refd)

Hock Hua Bank Bhd v Leong Yew Chin [1987] MLJ 230 (refd)

Ketteman v Hansel Properties Ltd [1988] 1 All ER 38 (refd)

Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor [1999] 1 MLJ 359 (refd)

Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors [1983] 1 MLJ 213 (refd)

Legislation referred to

Civil Law Act 1956 s 5

Merchant Shipping (Amendment and Extension) Act 1977

Merchant Shipping (Amendment and Extension) Act 1978

Merchant Shipping (Applied Subsidiary Legislation) Regulations 196

Merchant Shipping (Implementation of Conventions relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 r 11

Merchant Shipping Ordinance (Sabah Cap 11 of 1960)

Merchant Shipping Ordinance 1952 s 360

Rules of the High Court 1980, O 20 r 5(5)

Francis Wong (*Peter Lo & Co*) for the plaintiffs.

Saiful Azian bin Mokhtar (*Jayasuriya Kah & Co*) for the defendants.

Richard Malanjum J: On 1 March 2000 in the exercise of my discretionary power I dismissed the application by the defendants (encl 117) to amend their defence filed after a lapse of a period and while judgment is pending. In dismissing I stated that I would give my grounds in the event of an appeal. As there is now a notice of appeal filed these are therefore my reasons for dismissing the application.

But before going into the application itself I think it would be helpful to outline the position of the case just before the application was made.

The action was filed in 1995 and after the interlocutory matters had been disposed of the case was fixed for hearing. The trial proper commenced on 4 May 1999 and finished on 10 May 1999. Thereafter learned counsel for the parties sought time to prepare and file their respective written submissions. I therefore adjourned the hearing to 12 August 1999 to enable learned counsel to clarify any point raised in the submissions. On resumption of the hearing the then learned counsel for the defendants after going through the submission of learned counsel for the plaintiffs sought for two weeks to submit further on the issue of which merchant shipping legislation should apply in Sabah. Learned counsel for the plaintiffs also requested a similar period to reply to any further submission that might be filed for the defendants. In all therefore there was a further period of one month for the parties to ponder on the issue. In fact this is what transpired during that hearing:

> Vune: There is also an issue of the applicability of the Sabah Merchant Ordinance raised by learned counsel for the plaintiff. It is a fresh issue on question of tonnage limitation. Wish to address on this point. May I have two weeks to prepare my written submission on the point and also on the new case referred to by learned counsel for plaintiff? Thereafter judgment may be delivered. Require no further appearance to clarify.
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> Wong: Wish to answer the further submission of learned counsel for defendants. Require two weeks as well. Judgment may be delivered thereafter.
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> Court: As agreed, learned counsel for the defendants to submit further written submissions on the points he wishes to address within two weeks from today. Thereafter learned counsel for the plaintiffs also has two weeks after the receipt of the further written submission of learned counsel for the defendants to reply by way of written submissions.

But when the further submission of the then learned counsel for the defendants came in, he went on to deal with other points as well contrary to what was agreed during the proceeding.

Anyway, having received all the written submissions and in this case the plaintiffs' further submission was filed on 8 September 1999, I proceeded therefore to consider the case. But while I was in the process of formulating my judgment the defendants filed this instant application on 20 January 2000.

The hearing of the application could only be held on 1 March 2000 in view of my outstation sittings as well as to enable the parties to exchange their respective affidavits.

Now, in making the application, the then learned counsel for the defendants, Mr Peter Vung filed an affidavit in support affirmed on 18 January 2000 that stated, inter alia:

(4) In para 11 of the defence dated 4 March 1996, the defendants pleaded that they were entitled to limit their liability in accordance with the Malaysian Merchant Shipping Ordinance 1952 ('the 1952 Ordinance').

(5) Under Part IX of the 1952 Ordinance, provision is made in s 360 for the limitation of a shipowner's liability in certain cases, including any damage or loss to goods, merchandise or other things carried on board a ship, should the same occur without the actual fault or privity of the shipowners. An extract of s 360 of the 1952 Ordinance is exhibited at pp 16 to 18.

(6) However, this reference to the 1952 Ordinance was erroneous as the 1952 Ordinance was not, at the time, in force and applicable in the States of Sabah and/or Sarawak.

(7) In Sarawak, the applicable legislation excluding and/or limiting a shipowner's liability is set out in the Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 ('the 1960 Sarawak Regulations'). A copy of the 1960 Sarawak Regulations is exhibited at pp 19 to 32.

(8) By the (Sabah) Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 ('the 1961 Sabah Regulations'), the 1960 Sarawak Regulations were extended and applied mutatis mutandis, in North Borneo on 1 April 1961. A copy of the 1961 Sabah regulations is are exhibited at pp 33 to 34.

(9) The general liability of shipowners is set out in Part III of the 1960 Sarawak Regulations. Under reg 11, provisions are made in respect of the limitation of a shipowner's liability in certain cases, including any damage or loss caused to any goods carried on board a ship, should the same occur without the actual fault or privity of the shipowner. The full text of reg 11 is exhibited at pp 23 to 25.

(10) I have compared the provisions under s 360 of the 1952 Ordinance and reg 11 of the 1960 Sarawak Regulations, and I verily believe that the aforesaid provisions are in pari materia.

(11) The 1960 Sarawak Regulations were extended to Sabah and were in force at the material time. The defendants' case is that any loss or damage (which is denied) complained of by the plaintiffs herein had occurred without any actual fault or privity on the part of the defendants. In the event, the defendants would have, at all times, been availed of a tonnage limitation defence as owners of the vessel. Save that the reference in the defence filed earlier had made an erroneous reference to the 1952 Ordinance, the defendants now seek to correct this by the proposed amendment herein.

(12) By the proposed amendment, the plaintiffs would not be prejudiced as the defendants have not changed their defence in substance. The

A defendants therefore seek this honourable court's leave under the respective order and also its inherent jurisdiction to seek justice been done to amend the defence and respectfully pray for an order in terms of the application herein.

(13) I verily believe that the amendment sought for ought to be allowed under O 20 r 5(5) Rules of the High Court 1980 as the amendment B arose out of the same facts or substantially the same facts as a cause of defence in respect of which defence has already been pleaded in this action by the defendants applying for leave to make the amendment.

(14) I verily believe also there is no basic departure in the amended pleadings from the original pleadings and thus, the plaintiffs could not be said to be prejudiced at all if the amendments were allowed.

C (15) I verily believe that this application is made bona fide. And if there is any prejudice caused to the plaintiffs, the same could be compensated by costs. And lastly I verily believe that the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

D (16) I verily believe that the defendants had only been informed of the 1960 Sarawak Regulations and the 1961 Sabah Regulations recently. Immediately thereof the defendants proceed to make this present application for amendment. I verily believe this nature of admiralty cases particularly the defences of the tonnage limitation protection availed to the shipowners has not been reported in any recent cases or at all. Thus there is not made available both the regulations to the E defendants at the time of the first filing of the defence. During the course of the submissions having been exchanged between parties, the defendants came to acknowledge that the 1952 Ordinance particularly s 360 has now been repealed and is not extended to Sabah and Sarawak.

In opposing the application the plaintiffs filed an affidavit in opposition F affirmed by one Mr Hiew Vui Li on 25 January 2000. Therein he deposed to, inter alia:

5 I am advised by my solicitors that in the course of the submission on 12 August 1999, the solicitors for the plaintiffs submitted that the Malaysian Merchant Shipping Ordinance 1952 did not apply.

G 6 The learned High Court trial judge adjourned the submission for the defendants' counsel to reply whether the said Malaysian Merchant Shipping Ordinance 1952 applies and if my memory serves me right, the parties were given about a month each to submit on the relevant law.

7 During the course of submission, the defendants submitted that the said 1952 Ordinance applies and supported it accordingly.

H 8 The defendants have the benefit of reputable solicitors both from Sabah and Singapore but at no time was any effort made to amend the defence despite it having been pointed out that the said Malaysian Merchant Shipping Ordinance 1952 was not applicable.

9 I crave leave to refer to para 6 of the defendants' affidavit and state that the reference to the 1952 Ordinance was not erroneous as alleged by the I deponent of the said affidavit.

10 The defendants' counsel submitted and supported his submission why the said Ordinance was applicable by staling that the Merchant Shipping

(Amendment and Extension) Act 1977, Act 393, extended the said Ordinance to Sabah and Sarawak and a copy of the Act was exhibited. A

11 However, the plaintiffs' counsel replied by stating that this was repealed by Act 433, Merchant Shipping (Amendment and Extension) Act 1978.

12 I am advised by my solicitors that the amendment would in fact be an additional defence to be raised by the defendants. Despite full submission, the defendants stuck to the defence that the said 1952 Ordinance applies and did not make any effort to make the necessary amendment. B

13 It has prejudiced the plaintiffs as submissions have closed and are awaiting judgment. The plaintiffs did not have a chance to submit on whether the said Sarawak regulation could still apply in view of the many amendments made to admiralty law in Malaysia. Indirectly, the defendants are barring the plaintiffs from further submitting on the amending legislation. C

14 I am advised by my solicitors that parties are bound by their pleadings and since the defendants had chosen to reply on the 1952 Ordinance they should be bound by it and by amending the defence with the new amendment they would in substance be pleading a new defence. D

15 The plaintiffs are further prejudiced as the plaintiffs elected not to cross-examine on the tonnage issue in view that the 1952 Ordinance relied on by the defendants was not applicable. If the amendments were made during the trial, the plaintiffs would have proceeded to cross-examine on the tonnage issue. E

16 There was prejudice caused to the plaintiffs, I am advised by my solicitors and I verily believe cannot be compensated by costs as it is a complete new defence after the close of the trial and submission.

Perhaps it may also be of assistance if I reproduce herein the relevant paragraph of the defence as it stands and as proposed to be amended. F

Paragraph 11 of the defence reads:

> Further, and/or in the alternative, if the defendants are adjudged liable to the plaintiffs, which is denied, the defendants aver that the said wet damage to the goods and the loss damage expense caused thereby occurred without the actual fault or privity of the defendants and the defendants shall be entitled to limit their liability in accordance with the Malaysian Merchant Shipping Ordinance 1952 and the Merchant Shipping (Limitation of Liability) (Malaysian Ringgit Equivalents) Order 1993. G

And the proposed amended para 11 reads:

> Further, and/or in the alternative, if the defendants are adjudged liable to the plaintiffs, which is denied, the defendants aver that the said wet damage to the goods and the loss damage expense caused thereby occurred without the actual fault or privity of the defendants and the defendants shall be entitled to limit their liability in accordance with the Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960, and applied mutatis mutandis, in North Borneo by the Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 and the Merchant Shipping (Limitation of Liability) (Malaysian Ringgit Equivalents) Order 1993. H I

A In his first submission the then learned counsel for the defendants when addressing the issue in question said this:

> 101 In any event, the defendants' case is that their liability herein is limited by the tonnage of the vessel under s 360 of the Merchant Shipping Ordinance 1952 ('the Ordinance') (Item 20 of DBOA) in that the loss or damage to the cargo (which is denied) occurred without their actual fault or privity.

B

Learned counsel for the plaintiffs in answer to the above contention replied thus:

> 75 For tonnage limitation, the Merchant Shipping Ordinance 1952 may not be applicable to Sabah in view that we have our Merchant Shipping Ordinance (Sabah Cap 11 of 1960). Since the defendants has not pleaded the correct legislation, it is submitted that the court need not even consider this defence. In any event, our own Merchant Shipping Ordinance did not provide any limitation based on tonnage.
>
> 76 Even if we import the law as in England in view of the Civil Law Act 1956, s 5, the fact that the vessel was unseaworthy, the tonnage limitation cannot apply based on the authorities submitted herein.
>
> 77 Furthermore, there was no evidence adduced by the defendants to show that it was not their fault or privy, in order for the exception to apply. As I have submitted, the evidence in fact showed otherwise, that is, the damage could not have occurred but for the fault or privy of the defendants.
>
> 78 The defendants used what they termed 'rule of thumb' to calculate the tonnage limitation. With the greatest respect, this cannot be so. This court does not operate on the basis of 'rule of thumb'. There must be evidence before this court of the ship tonnage and the burden is on the defendants. They have failed to prove nor have they adduced any evidence of the tonnage of the vessel any of the allegations pleaded in para 11(a) to (k) of the defence.
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> 79 It is my humble submission that the defendants' attempt to limit liability must fail on the grounds of pleading and absence of evidence.

C D E F

In his subsequent written submission the then learned counsel for the defendants said this pertaining to the legislation applicable:

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> 39 With respect to the application of the Malaysian Merchant Shipping Ordinance 1952 in Sabah and Sarawak, the defendants will clarify that the Merchant Shipping (Amendment and Extension) Act 1977, Act A393, [item 31 of DBOA] extended the operation of the Malaysian Merchant Shipping Ordinance 1952 throughout Malaysia. This was effected by PU(B) 280/91 [item 32 of DBOA] the date on which Act A393 came into force in Sabah and Sarawak on 1 June 1991.
>
> 40 In the premises, the operative legislation in this case is the Malaysian Merchant Shipping Ordinance 1952 and not the Merchant Shipping Ordinance (Sabah Cap 11 of 1960) as alleged by the plaintiffs.

H

I Learned counsel for the plaintiffs answered in this way:

> 4 The defendants submitted that the Merchant Shipping Ordinance 1952 is applicable to Sabah because of the Merchant Shipping (Amendment

and Extension) Act 1977 Act A393 which was effected by PU(B) 280/91 which took effect on 1 June 1991.

5 The plaintiffs submit that this is a half-truth. Act A393 was amended in by Act 433, the Merchant Shipping (Amendment And Extension) (Amendment) Act 1978. (See the plaintiffs' second bundle of authorities)

6 By s 2 of Act 433, the Merchant Shipping (Amendment and Extension) Act 1977 was amended by sub-s (a) as follows:
(a) by substituting for the long title the following:

> 'An Act to amend the Merchant Shipping Ordinance 1952 and to extend specified provisions thereof, as amended, to the States of Sabah and Sarawak, and to provide for matters connected therewith.'

7 The specified provisions referred to are the provisions of Part IIA and Part IIB of the Ordinance and this is found at s 5 of Act 433 which reads: 5(1) The provisions of Part IIA and Part IIB of the Ordinance are extended to the States of Sabah and Sarawak.

8 Part IIA deals with the 'Registry' (see p 36 of defendant's further bundle of authorities). And for Part IIB it deals with 'The Domestic Shipping Licensing Board' (see p 47 of the defendants' further bundle of authorities).

9 Further support could be found at the Fourteenth Schedule of the Ordinance (see the plaintiffs' second bundle of authorities) which deals with the repeal of certain Act or Ordinance in other States, and it is clear that the Sabah Merchant Shipping Ordinance No 11 of 1960 is not one of them.

10 As far as Sabah is concerned our own Merchant Shipping Ordinance No 11 of 1960 is still in force.

11 Hence, the submission by the defendants that s 360 of the Merchant Shipping Ordinance 1952 is applicable to Sabah is per incuriam because the liability of the shipowners is found in Part IX of the 1952 Ordinance which was not extended to Sabah by Act 433.

12 It is my humble submission that the Merchant Shipping Ordinance 1952 of West Malaysia is not applicable to Sabah and hence, the plaintiffs' claim cannot be limited as alleged by the defendants even if there were evidence of tonnage limitation (which in the present case there was no such evidence).

From the foregoing, it is obvious that then learned counsel for the defendants has not been candid as shown in para 16 of the affidavit in support. There could not therefore have been any question of the defendants being informed 'recently' of the applicability of the Malaysian Merchant Shipping Ordinance 1952 (the 1952 Ordinance). The least then learned counsel could have done was to check the relevant law after being contested by learned counsel for the plaintiffs as early as the final submission stage. If only that was done then the necessary application to amend the defence could have been made even before the further submissions were filed. Instead he stood his ground and did so until the filing of the present application. It would only be appropriate that he and/or his instructing solicitors should answer to their client for the mess that was created in this case. Maybe it is apt to echo what was said by Lord

A Griffiths in the case of *Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38 at p 62:

> We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings.

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Thus, even at this stage there was no good reason advanced for me to exercise my discretion in allowing the application to amend the defence at such a late stage. I do not think it has been made in good faith on the part of then learned counsel acting for the defendants.

C

Be that as it may, in dismissing the application it was in the forefront of my mind the governing principles required to be considered in connection with an application to amend pleadings.

In the case of *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors* [1983] 1 MLJ 213 his Lordship Mohd Azmi FJ (as he then was) said this at
D p 214:

> Under O 20 of the Rules of the High Court 1980, which is equivalent to O 28 of the Rules of the Supreme Court, a judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v Kam Fatt Tin Mine* [1963] MLJ 248. The general principle is that *the court will allow such amendments as will cause no*
E *injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result*:
>
> (1) *whether the application is bona fide*;
>
> (2) *whether the prejudice caused to the other side can be compensated by costs*; and
>
> (3) *whether the amendments would not in effect turn the suit from one character into*
F *a suit of another and inconsistent character.* (*See* Mallal's Supreme Court Practice *p 342*).
>
> *If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause*
G *of action in respect of which relief has already been claimed in the original statement of claim.* (Emphasis added.)

A similar view was expressed in the case of *Hock Hua Bank Bhd v Leong Yew Chin* [1987] MLJ 230 where his Lordship Abdul Hamid Ag LP (as he then was) at p 232 whilst quoting a passage from *Mallal's Supreme Court Practice*
H p 251 said this:

> As for the general principles for the granting of leave to amend:
>
> > 'It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error
I in any proceedings" (see per Jenkins LJ in *GL Bakar Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216 at p 1231; [1958] 3 All ER 540 at p 546).

'It is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right' (per Bowen LJ in *Cropper v Smith* (1883) 26 Ch D 700 at pp 710–722, with which observations AL Smith LJ expressed "emphatic agreement" in *Shoe Machinery Co v Cultam* [1896] 1 Ch 108 at p 112).

In *Tildesley v Harper* (1876) 10 Ch D 393 at pp 396, 397 Bramwell LJ said: "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." (*The Supreme Court Practice* 1985 para 20/5-8/6 p 340).

See also *Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor* [1999] 1 MLJ 359 (CA) where the headnote reads thus:

A plaintiff seeking an order under O 20 r 5 of the RHC must satisfy two requirements in O 20 r 5(2) and (5): (i) that the facts of the case remain the same or substantially the same; and (ii) that it would be just to grant leave to amend. If he fails one, he fails altogether. In the present case, the appellant had satisfied condition (i) but had failed to satisfy condition (ii). Further, the question of whether this application was bona fide also had to be considered. No reasons were given for the delay in filing this application and the application bordered on lack of bona fides. The High Court judge had correctly considered the two requirements under O 20 r 5(2) and (5) and had exercised his discretion judicially. There were no good grounds for this court to interfere.

And in *Bacom Enterprises Sdn Bhd v Jong Chuk & Ors* [1998] 2 MLJ 301 Mokhtar Sidin JCA said this at p 306:

Generally speaking, the exercise of the power to grant or refuse amendment of pleadings at any stage of the proceedings is in the discretion of the judge, but the power must always be exercised judicially having regard to the prevailing practice and whether the amendment sought by one party, if allowed, would cause injustice or prejudice to the other party which cannot be compensated by costs, bearing in mind that it is not always easy to measure justice in terms of money. Where the amendment causes no injustice or prejudice, it should be allowed. Each application must therefore be decided on its own merit.

Learned counsel for the defendants submitted that there could be no prejudice to the plaintiffs that could not be compensated in terms of costs. Indeed he said that the proposed amendment would only be cosmetic in nature as the relevant section in the 1952 Ordinance is in pari materia with

A the (Sabah) Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 (the Sabah Regulations) which adopted Sarawak's Merchant Shipping (Implementation) of Conventions relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 (the Sarawak Regulations).

B It may be so as regards the terms of the respective provisions. But the position taken by the plaintiffs in the course of the trial should also be taken into account in considering whether there could be prejudice to the plaintiffs if the proposed amendment were allowed.

Learned counsel for the plaintiffs submitted that in view of the stand C taken by the defendants during the trial, that is, that the applicable law should be the 1952 Ordinance whilst the plaintiffs took the contrary position, it was therefore deemed not necessary to go into the issue of tonnage of the vessel in question. As such he contended that to allow the proposed amendment would therefore be highly prejudicial to the plaintiffs since they would be deprived of examining the witnesses on the issue of the D tonnage of the vessel.

In reply it was canvassed on behalf of the defendants that the failure of the plaintiffs to examine on the issue of tonnage was of their own doing.

With respect, I am inclined to agree with the contention of learned counsel for the plaintiffs. As pleaded, legislation by the defendants was not E applicable to begin with. There was therefore, no reason for the plaintiffs to indulge on the issue of tonnage during the trial or in the submission.

Meanwhile, if the proposed amendment were allowed then the result would be that evidence of tonnage could be vital. But this case is now pending judgment. Thus, if the application were allowed to succeed then it F would mean that the case would have to be reopened to accommodate the reception of the evidence on tonnage. That would not only cause further delay which could have been avoided if only then learned counsel for the defendants had acted prudently in handling the case but would again depend on whether they could be found in the first place. That in my judgment would be highly prejudicial to the plaintiffs which monetary G compensantion would not be adequate. In other words, it would not be just to do so.

(See *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205).

H Moreover, I am also in agreement with the submission of learned counsel for the plaintiffs that if the application were allowed then it would be tantamount to permitting the defendants to plead a new defence. And that can be construed on the basis that based on the existing pleaded legislation the plaintiffs only have to say that the statute is not applicable and thus irrelevant to the case. However, with the proposed amendment the I plaintiffs will have to address it since there is no dispute that the cited legislation is applicable. And that may be a little too late since the parties have concluded the case and it is pending judgment.

Hence, it is also for the foregoing reasons that I refused application of the defendants.

There were also other reasons put forward by learned counsel for the plaintiffs in objecting to the present application. But in view of the conclusion that I have arrived at I do not think it necessary for me to go into details thereof. Suffice it to say that I agree with his contention that the affidavit in support filed on behalf of the defendants has failed to show that there is already evidence adduced during the trial pertaining to the tonnage of the vessel thereby making it unnecessary to call any other witness to clarify such an issue.

To sum up, I would say that the application of the defendants failed to meet at least two basic prerequisites in an application to amend pleadings, namely, that it is bona fide and that it is just to do so, bearing in mind the prejudicial effect upon the opposing side if it is allowed.

Finally, it is inevitable that the consequence of the pending appeal by the defendants is that I may be compelled to await its result before delivering my judgment. If I were to deliver my judgment before the disposal of the appeal and in the event of the defendants succeeding in their appeal, a retrial order might be ordered. Thus, to save time and costs, it may be best that I defer the delivery of my judgment until the outcome of the appeal is known.

Order accordingly.

Reported by Andrew Christopher Simon